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In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 926

STEBNER LIGHTING, INC. AND KENNETH F. GUDGEBOB
Petitioners

vs.

ALLIED ELECTRICAL SUPPLY, INC., CAPELETTI BROTHERS, INC., AND PHILLIPS-BROCK ELECTRICAL CONTRACTORS, INC.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ALLIED ELECTRICAL SUPPLY, INC., CAPPELETTI BROTHERS, INC., AND PHILLIPS-BROCK ELECTRICAL CONTRACTORS, INC.
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the portion of the judgment of the United States Court of Appeals for the Fifth Circuit dated August 5, 1970, holding Claim 11 of United States Letters Patent 3,141,620 noninfringed.

OPINION BELOW

The order of the United States District Court for the Southern District of Florida, dated July 15, 1969, held that Petitioners were entitled to a judgment that Claims 11, 12 and 14 of the patent were valid and infringed; the par-

tial final judgment pertaining thereto being dated August 22, 1969 and filed August 25, 1969. The opinion of the United States Court of Appeals for the Fifth Circuit (August 5, 1970) is reported at A. pp. 9, 10, 165 USPQ 454. A copy of the order and judgment of the District Court is appended to this petition in the Appendix at pp. 6, 7, and 8; and a copy of the Opinion and Judgment of the Court of Appeals being appended in the Appendix at pp. 9 and 10.

JURISDICTION

The judgment of the Court of Appeals is dated August 5, 1970. The order of the Court of Appeals denying Petitioners' Petition for Rehearing and/or Clarification which is dated and entered September 21, 1970, is as yet unreported, a copy of this order being appended in the Appendix at p. 7. The jurisdiction of this Court is invoked under 1254(1) of the *Judicial Code* [28 U.S.C Sec. 1254(1)].

QUESTIONS PRESENTED

(1) In determining that there was no infringement of Claim 11 of United States Letters Patent to Kenneth F. Guggenheim, No. 3,141,620, can the Court of Appeals, under the law, disregard the evidence including an admission by Respondents' witness there is infringement of Claim 11 and the lack of evidence to the contrary, overturn the finding of a jury and the District Court that Claim 11 was infringed?

(2) Can the Court of Appeals disregard the language of Claim 11 that reads on the alleged infringing device wherein the claimed structure and alleged infringing device

function the same and reverse the trial court's holding of infringement?

(3) Can the Court of Appeals as a matter of law read into a claim, limitations not appearing therein in order to find there is no infringement?

STATEMENT

Petitioners are respectively the exclusive licensee under United States Letters Patent 3,141,620 (587-595a[1]) and the title holder of the patent (25a, 26a). Respondents are respectively the local supplier, the general contractor and the electrical contractor of the alleged infringing devices that were sold and installed at the South Campus of Miami-Dade Junior College (25a, 26a). The manufacturer of the alleged infringing devices was Pfaff and Kendall, of Newark, New Jersey.

Kenneth F. Guggemos (hereinafter referred to as "Guggemos") on May 5, 1960 applied for and on July 21, 1964 was granted the patent in suit. In 1960, pursuant to an exclusive licensing agreement with Guggemos, Sterner commenced to manufacture and market hinged base area lighting devices covered by Claim 11 of the Guggemos patent.

In 1964, Pfaff and Kendall (hereinafter referred to as "P & K"), competitors of Sterner, were urged by their employee, F. E. "Frosty" Pope, P & K's Western Sales Manager (182a) to start designing a hinged shoe base to meet the Sterner competition (602a, 603a). At the time P & K were designing their hinged base pole, they had drawings of the Sterner-Guggemos hinged base (226a) and a sample

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[1]Refers throughout to the two volumes Appendix to the briefs filed in Appeal to the Court of Appeals.

of the Sterner hinged base (208a, 606a) in their plant. Prior to P & K making the allegedly infringing hinged base, it considered using a "Calso" tilt base which it had manufactured between 1954 and 1957.

On August 18, 1966, Petitioners instituted suit in the District Court for infringement of Claims 11, 12 and 14 of the Guggemos patent (9a-12a), and thereafter P & K agreed to indemnify the Respondents and to defend them in the lawsuit (628a, 629a). The District Court proceedings was tried from April 29, 1969 through May 6, 1969 before a jury.

During the trial in District Court, the Petitioners' witness, Mr. Grannis, applied the language of Claim 11 of the patent in suit to the infringint device word for word, without any equivocation (62a-81a). This was done in direct examination, and Mr. Grannis was not cross examined. All evidence presented showed that all elements of Claim 11 essential to the combination were present in the alleged infringing device.

The record shows that all of the elements essential to Claim 11 of the patent in suit were conceded to be found in the alleged infringing device by Respondents own expert witness, George Baldwin, the only witness of Respondents that discussed infringement, in the following colloquy appearing on page 440 of the appendix to the briefs in the Court of Appeals:

> "Mr. Baldwin:
>
> I have tried to read these claims on the accused device.
>
> By Mr. Sommers:
>
> Q. Are you referring to Exhibit D-22 in court before us?
>
> A. Yes, I am. and Claim 11 seems to read very closely on this device.

> It is difficult to interpret the words of Claim 11 so that they do not read on this device."

The District Court recognized this admission that Claim 11 "read on" the accused structure as a concession that as a matter of law and fact Claim 11, if valid, was infringed and did not submit the issue of infringement of Claim 11 to the jury. (See special verdict forms relative Claim 11 at 681a and compare verdict No. 4 relative Claims 12 and 14 at 682a and 683a). As pointed out in the District Court's charge (562a) the trial court, when discussing the special verdict forms with the jury stated that there was no contest about infringement of Claim 11 and:

> "If there is a valid claim in Claim 11, that there has been infringement by the defendants on this Claim 11 there is no dispute in the case on that point."

The jury resolved the issues of anticipation and infringement in favor of the Petitioners, the jury verdict being dated May 6, 1969. Respondents moved for a judgment notwithstanding the verdict or in the alternate for a new trial. By an order dated July 19, 1969, the District Court denied the motions for judgment notwithstanding the verdict and for a new trial and resolved the legal question of obviousness in Petitioners' favor (681a-685a). The partial final judgment of the District Court as to infringement and validity was rendered (686a-687a).

The Respondents appealed from the District Court to the Fifth Circuit Court of Appeals the partial final judgment as to the decision of validity and infringement. After the filing of briefs and the hearing of oral arguments, the Court of Appeals held Claims 11, 12 and 14 valid but not infringed, the opinion of the Court of Appeals in part stating ". . .

we find the construction we have been required to place upon the patent enables us to decide the issue in infringement as one of law . . ." 166 USPQ 454, 458. In Respondents' brief filed with the Court of Appeals there was no contention that Respondents avoided infringing Claim 11 except on the ground that Claim 11 was invalid and therefore not infringed.

Thereafter, based on this glaring error of law, Petitioners filed a Petition for Rehearing and/or Clarification of the Court of Appeals' decision, which was denied.

ARGUMENT

In the trial of this case before a jury uncontradicted evidence showing that Claim 11 was infringed was presented. There was no evidence to the contrary, and there was no dispute as to Claim 11 being infringed, if it was valid. As indicated in Exhibit P-51 (623a), each and every element recited in Claim 11 appears in the alleged infringing device in the same relationship as recited in the claim As stated by this Court in *Graver Tank Co. v. Linde Air Prod. Co.*, 339 U.S. 605, 607 (1950):

> "In determining whether an accused device or composition infringes a valid patent, resort must be had in the first instance to the words of the claim. If accused matter falls clearly within the claim, infringement is made out and that is the end of it."

This is the rule of law on determining infringement.

However, the Court of Appeals did not follow this settled rule of law nor did it make an analysis of the claims in suit in accordance with this rule. Rather, the Court of Appeals at 166 USPQ 459 states:

> "A combination patent is not infringed unless the accused device is substantially identical to the patent in all elements that are essential to the combination. *Reed v. Parrack*, 5th Cir. 1960, 276 F.2d 784, 188, 125 USPQ 256, 259."

and then went on to note some of the differences between the device described in the Guggemos patent in suit and the alleged infringing device. The Court of Appeals held that in view of the differences there was no infringement. The "differences" the Court of Appeals found between the device described in the Guggemos patent in suit and the alleged infringing device were structural details *not present* in Claim 11. This is why error is present. A settled rule of law had been ignored. Injustice has been done.

Further, *Reed v. Parrack, supra*, does not stand for the proposition that where all elements of a claim are present in the accused structure there is no infringement if there is no substantial identity between the device described in the patent and the accused device. Rather in *Reed v. Parrack* at 276 F.2d 787, the Court in affirming the lower court's decision that Claim 1 of U.S. Patent 2,680,945 was not infringed, found that at least *one element of the patent claim in issue was not present in the accused device* and that the accused device did not have any structure that performed the same function. Thus, this case does not support the proposition which the Court of Appeals indicates that it stands for.

Additionally, while upholding the validity of Claim 11, the Court of Appeals erroneously construed Claim 11 in a manner considerably different from the plain, unambiguous language of the claim in order to hold there was no infringement. Since Claim 11 clearly and concededly reads

on the alleged infringing device, and since both the claimed device and the alleged infringing device perform the same function to accomplish the same result, neither the Petitioners nor the public know what structure infringes Claim 11, as construed by the Court of Appeals. To construe Claim 11 as done by the Court of Appeals is improper. As stated in *White v. Dunbar*, 119 U.S. 47 (1886) at page 51:

> "Some persons seem to suppose that a claim in a patent is like a nose of wax which may be turned and twisted in any direction, by merely referring to the specification, so as to make it include something more than, or something different from, what its words express. The content may undoubtedly be resorted to, and often is resorted to, for the purpose of better understanding the meaning of the claim; but not for the purpose of changing it and making it different from what it is. The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is, and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms. This has been so often expressed in the opinions of this court that it is unnecessary to pursue the subject further. See *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U.S. 274, 278; *James v. Campbell*, 104 U.S. 356, 370."

There was no evidence presented to support a finding of noninfringement of Claim 11. Rather the Respondents' own witness stated the claim read on the accused structure. The terminology used in the claim is clear and unambiguous. There was no contention by the Respondents that the language was not applicable to the alleged infringing device. Thus, it was legal error for the Court of Appeals to incorporate structural limitations of the claimed device as described in the specification into Claim 11.

CONCLUSION

For the foregoing reasons and because the Court of Appeals failed to follow the proper test of infringement as set forth in *Graver v. Linde, supra*, we submit certiorari should be granted in the instant case.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NUMBER 66-963-Civ-JE

STERNER LIGHTING, INC., et al.,
Plaintiffs,

vs.

ALLIED ELECTRICAL SUPPLY, INC., et al.,
Defendants.

Order

"Claim 11

A jury returned the following verdicts in this case:

Each of the following questions relate solely to Claim 11 of the Guggemos patent in suit and should be answered either "Yes" or "No".

1. Is there anywhere disclosed in the prior art as of May 5, 1959, the combination of elements recited in Claim 11 of the Guggemos patent in suit? No.

2. Claim 11 of the patent in suit recites a lighting device combination of a pole having a light at the top and a hinged base at the bottom and a heavy electrical auxiliary component mounted inside the pole near the lower end of the pole.

Is this an improvement over the prior art (patents and public uses) as the art existed May 5, 1959? Yes.

3. If your answer to #2 is "Yes", would such improvement have been obvious to one having an ordinary skill in the art? No.

Dated May 6, 1969.

KENNETH H. DOIG,
Foreman."

"Claim 12

Each of the following questions relate solely to Claim 12 of the Guggemos patent in suit and should be answered either "Yes" or "No".

1. Is there anywhere disclosed in the prior art as of May 5, 1959, the combination of elements recited in Claim 12 of the Guggemos patent in suit. No.

2. Claim 12 of the patent in suit recites a base for a lighting device which comprises the combination of a foundation plate and a support plate with a hinge connected to the plates alone one edge portion thereof so that the plates are generally parallel and spaced apart in operating position with a skirt in conjunction with the hinge means bounding the space between the plates.

Is this an improvement over the prior art (patents and public uses) as the art existed May 5, 1959? Yes.

3. If your answer to #2 is "Yes", would such improvement have been obvious to one having an ordinary skill in the art? No.

4. Is every part or element recited in Claim 12 of the Guggemos patent in suit in the combination recited therein present in the accused device that was sold or installed

by the defendants at the South Campus of Miami-Dade Junior College that has been marked Plaintiffs' Exhibit 22? Yes.

Dated May 6, 1969.

KENNETH H. DOIG,
Foreman."

"Claim 14

Each of the following questions relate solely to Claim 14 of the Guggemos patent in suit and should be answered either "Yes" or "No".

1. Is there anywhere disclosed in the prior art as of May 5, 1959, the combination of elements recited in Claim 14 of the Guggemos patent in suit? No.

2. Claim 14 of the patent in suit recites a hinged base for a standard which is the combination of a foundation plate and a support plate with hinge means on one end portion of the support plate and foundation plate, the hinge means including spaced hinge pivots and a hinge pin pivotally securing the plates together and boss means for supporting the plates spaced apart and held in parallel relation in operating position to form a ventilation space between them and means for securing the hinge pin in hinging position.

Is this an improvement over the prior art (patents and public uses) as the art existed May 5, 1959? Yes.

3. If your answer to #2 is "Yes", would such improvement have been obvious to one having an ordinary skill in the art? No.

4. Is every part or element recited in Claim 14 of the

Guggemos patent in suit in the combination recited therein present in the accused device that was sold or installed by the defendants at the South Campus of Miami-Dade Junior College that has been marked Plaintiffs' Exhibit 22? Yes.

Dated May 6, 1969.

KENNETH H. DOIG,
Foreman."

The question of "obviousness" was presented to the jury by agreement of counsel with the understanding that the jury verdict in that regard would not be "binding" upon the Court in view of Swofford v. B. & W. Inc., 395 F.2d 362 (5th Cir. 1968). Defendants-counterclaimants moved for judgment n.o.v. or in the alternative a new trial. Counsel for the parties presented briefs and the Court heard argument on the motion.

Upon consideration, the Court concludes that defendants are not entitled to a new trial. Therefore, under Swofford, supra, the duty now falls upon the Court to answer the question which was put to the jury in question #3 in each of the verdict forms. To answer it is to determine the validity or invalidity of the patent.

The jury has made factual determinations as to improvements over the prior art as the art existed May 5, 1959. The Court is now to decide whether such improvements would have been obvious to one having ordinary skill in the art a decade ago.

"Obviousness" must clearly and convincingly appear before invalidity may be found by the Court.[1]

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[1] I hesitate to use the term "burden of proof" re: a conclusion of law.

Counsel for plaintiffs have warned the Court not to equate simplicity with obviousness. Counsel for the defendants want the Court to understand that testimony concerning "long felt need," "failure of others," "copying," and "commercial success," may be considered, but that such evidence is certainly not conclusive. Having thus been propitiously warned by counsel for both sides not to oversimplify the question before the Court, the Court finds as a matter of law that the improvements found by the jury to have existed as recited in paragraph #2 of the verdict form as to each of the three claims would not have been obvious to one having ordinary skill in the art.

There is evidence supporting "long felt need," "failure of others," "copying," and "commercial success," and there is evidence that commercial success was due at least in part to plaintiffs' product itself (particularly due to the hinged base). However, those factors are not controlling factors in the Court's consideration. The conclusion reached results from the best effort of a judicial officer with ordinary skill in that art and no skill at all in structurally designing electrical devices to look to the "sum of the record" to determine whether or not the improvements found by the jury would have been obvious ten years ago to our hypothetical artisan in the field.

They may look obvious to some viewers in 1969, but it is not clear to the Court and the Court is not convinced that the improvements made by the patentee would have been obvious at the time the combination was put together.

Accordingly, the Court concludes that the Guggemos combination patent is valid.

Therefore, it is

Order and Adjudged that:

1. Defendants-counterclaimants' motion for judgment n.o.v. or in the alternative for a new trial is denied.

2. Defendants-counterclaimants cannot recover on their counterclaim seeking a determination of validity.

3. Plaintiffs are entitled to a judgment that claims 11, 12 and 14 of the patent in suit are valid and have been infringed by the defendants.

Plaintiffs will present an appropriate judgment.

Done and Ordered at Miami, Southern District of Florida, this 1st day of July, 1969.

JOE EATON,
United States District Judge.

cc: Mershon, Sawyer, Johnston, Dunwody & Cole
Shutts & Bowen

Partial Final Judgment

This Cause came on for trial before the Court and a jury on April 29, 1969, which trial continued through May 6, 1969, resulting in special verdicts favorable to the plaintiffs. On July 1, 1969, this Court entered an Order denying the defendants' motion for judgment n.o.v. and alternative motion for new trial and holding that the plaintiffs' patent in suit was valid and infringed. Accordingly, it is

Ordered and Adjudged that:

1. Kenneth F. Guggemos, of Winsted, Minnesota, is the record owner of letters patent of the United States No. 3,141,620 and Sterner Lighting, Inc., owns and holds exclusive licensing rights under said letters patent.

2. Patent No. 3,141,620 is good and valid in law with respect to Claims 11, 12 and 14 thereof which were the only claims in suit.

3. The defendants, Allied Electrical Supply, Inc., Capeletti Brothers, Inc., and Phillips-Brock Electrical Contractors, Inc., have each infringed Claims 11, 12 and 14 of the United States Patent No. 3,141,620 by assembling, using or selling lighting devices manufactured by Pfaff & Kendall of Newark, New Jersey. The defendants, their officers, clerks, attorneys, servants, agents and employees are hereby enjoined and restrained permanently from directly or indirectly assembling, using or selling devices covered by Claims 11, 12 and 14 of United States Patent No. 3,141,-620.

4. The defendants' counterclaim seeking a determination of invalidity and non-infringement of United States Patent No. 3,141,620 is dismissed with prejudice.

5. The trial of defendants' counterclaim for alleged violation by plaintiffs of the antitrust laws of the United States and the trial of plaintiffs' claim for damages and for an accounting are, by consent of all parties, deferred until the final disposition of whatever appellate proceedings might arise from the entry of this Partial Final Judgment.

6. The taxation of costs in this case is, by consent of all parties, deferred until the final disposition of whatever

appellate proceedings might arise from the entry of this Partial Final Judgment.

7. The Court finds expressly under the provisions of Federal Rule 54(b) that there is no just reason for delay of the entry of this Partial Final Judgment on the issues of patent validity and infringement.

Done and Ordered at Miami, Southern District of Florida, this 22nd day of August, 1969.

JOE EATON,
United States District Judge.

cc: Sommers & Sommers
Dugger, Peterson, Johnston & Westman
Shutts & Bowen
Mershon, Saywer, Johnston, Dunwody & Cole

UNITED STATE COURT OF APPEALS
For the Fifth Circuit

October Term, 1969

No. 28599

D. C. Docket No. Civ. 66-963-JE

STERNER LIGHTING, INC., ET AL.,
Plaintiffs-Appellees,

versus

ALLIED ELECTRICAL SUPPLY, INC., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

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Before Brown, Chief Judge, Gewin and Thornberry, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District

Court in this cause be, and the same is hereby, reversed;

It is further ordered that plaintiffs-appellees pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

Brown, Chief Judge, concurring in part and dissenting in part: August 5, 1970.

Issued As Mandate:

Thornberry, Circuit Judge: The subject of this patent-infringement suit is lamp-post bases. The trial court held appellees' patent on their lamp-post base valid and found appellants liable for infringement. On this appeal, we agree with the trial court that the patent was valid, but we find the judgment of infringement to be based upon an overly generous reading of the claims, and accordingly we reverse and render judgment for appellants.

Both companies have been in the lamp-post base business for a number of years. Before either the patent at suit issued or the allegedly infringing device was marketed, appellant Allied manufactured a device called the "Calso base." Although it never achieved a high degree of commercial success, the Calso base embodied a number of advantageous ideas, some of which were old and some new. The essential feature of the base was a hinge attached to its bottom that allowed the entire pole to swing down to the ground for easy installation and maintenance of lamps (see Figure 1). The base itself was a hollow pedestal, terminating at its upper end in a pole. It had a removable

plate that allowed access to the transformer and wiring inside. The Calso base was used mainly in the middle and late 1950's, but its bulk and lack of strength caused it to have disadvantageous properties that in turn induced Allied to discontinue merchandising it.

The patented base, which Allied is accused of infringing, is manufactured by Sterner Lighting, Inc., one of the appellees. Sterner filed its application in 1960 and began at that time to merchandise its base, which proved highly successful commercially. This base is stronger and smaller than the Calso device, partly because the electrical components that must go into it had been more carefully developed by 1960 and were themselves smaller. The base is a flat plate attached to the bottom of the pole, hinged at one edge, with a short border hanging down and supported on the edge opposite the hinge by two knobs coming out of the foundation (see Figure 2). The device can be easily operated by one or two men. Its sales rose from approximately $1,000 in 1960 to nearly $2,000,000 in 1967.

About 1964 appellant Allied and its customers began to feel pressure from the success of the Sterner device. Builders and architects engaged in area lighting projects had begun to specify the Sterner base to an extent that it was cutting into Allied's customers' markets. One of Allied's customers, Pfaff & Kendall, requested that Allied's engineering department construct a base that would have the advantageous characteristics of the Sterner device. Engineering replied with the suggestion that Pfaff & Kendall use the old Calso base, to which a Pfaff & Kendall marketing manager replied, "This base is a killer. It can get away. That is one reason it is no longer used. "Thus there can be no question that it was in response to competition from

the Sterner device that Allied developed the base that is here accused of infringing the Sterner patent (see Figure 3). Allied was clearly trying to reproduce the advantageous features of that device. The Allied base shares common characteristics with the Sterner base: It is short and low to the ground, it necessitates placement of the electrical essentials in the pole, and it consists, in part, of a flat plate at the bottom of the pole horizontal to the ground and attached to the hinge. Like the Sterner base, it is light, strong, and easy to operate.

The question of validity of the patent is the first one we must consider, because of the deep public interest in existence of patent monopolies. See Beckman Instruments, Inc. v. Chemtronics, Inc., 5th Cir. 1970, — F. 2d — [No. 27412, slip opinion dated April 14, 1970]. Allied argues that it is invalid both because it is obvious and because it is anticipated by the prior art. After consideration of this question, we take up the second issue in the case, which is whether the Allied device infringes the claims of the patent when those claims are properly construed.

I. Validity of the Patent and Construction of its Claims

A. Anticipation

Appellant Allied first argues that the patent is invalid because it was anticipated by the Calso device. The Calso base and the patented invention of course have some characteristics in common, most notably the hinge, but there are also major elements that make the patented device a different invention from Calso. These differences are the essence of the patent. Sterner's licensor, in describing the patent in

the trial court, pointed out the following differences between it and the prior art: (1) The base plate is flat and attached to the bottom of the pole and bolts around its edges are used to keep it down. (2) The ballast (that is, the weighting material, which also happens to be the electrical equipment) is in the pole itself rather than in the base. (3) Ventilation space is provided at the bottom. (4) The sides of the base are covered by a skirt attached to the base plate. (5) "Bosses," or knobs, from below, hold up the edge of the base plate that is not supported by the hinge.

In order to show anticipation, Allied's witnesses attempted to show that the Calso device embodied equivalents of all these characteristics. For example, testimony equated the sides of the Calso pyramidal base with the pole on the patented device, in order to show that the ballast in Calso was also in the pole. The trouble with this approach is that the Calso pedestal base is different from a pole in structure: It is bigger, heavier, and not as strong. Similarly, the testimony equated the sides of the Calso pedestal, several feet high, with the skirt surrounding the patented device, which is only a few inches high. These elements serve the same functions in the two devices, but again they are structurally different. The jury found against Allied on the issue of anticipation.

Anticipation is largely a question of fact. See Graham v. John Deere & Co., 1965, 383 U.S. 1, 86 S.Ct. 684, 15 L.Ed.2d 545; Swofford v. B & W Inc., 5th Cir. 1968, 395 F.2d 362; American Fidelity & Cas. Co. v. Drexler, 5th Cir. 1955, 220 F.2d 930, 932-33. There are cases in which anticipation depends so heavily upon issues of law that it may be reviewed directly by an appellate court, but this is not such a case. Cf. Beckman Instruments, Inc. v. Chem-

tronics, Inc., supra. A jury verdict on the factual issue of anticipation will not be overturned unless fair-minded men could not disagree as to a contrary result. We hold that the jury's finding that the patent was not anticipated by the Calso device is not reversible on this appeal.

B. Obviousness

Allied also urges that the patent is invalid because the innovations that make it what it is would be obvious to a person possessing ordinary skill in the art. Obviousness is a difficult, elusive standard to apply. The Supreme Court has recently dealt with the concept in several opinions. In one such case, United States v. Adams, 1965, 383 U.S. 39, 86 S.Ct. 708, 15 L.Ed.2d 572, the Court considered a patent on a special kind of battery. The patent specifically described the components and their relation to each other. The components were all known, but the combination was a specific solution to technical problems that required the exercise of some skill because the components had to be chosen so that they worked together. The Court therefore held the patent valid. By contrast, in Anderson's-Black Rock, Inc. v. Pavement Salvage Co., 1969, 90 S.Ct. 305, the Court held a patent on a device to lay asphalt pavement invalid. The device was the first successful machine of its kind. But it was merely a combination of known elements that produced no synergistic result, to which the patentee had contributed no novel arrangement. His patent was invalid because it required him to do nothing but adopt known components, and it was not saved by the fact that no one had ever so used them before. See also Graham v. John Deere & Co., supra) cf. Beckman Instruments, Inc. v. Chemtronics, Inc., supra. Our question on

this appeal is whether the Sterner patent is closer to the Adams or to the Anderson's-Black Rock situation, and it appears from the decisions that the key to this question is whether the patentee has solved non-trivial technical problems by purposefully manipulating variables so as to elicit a synergistic result from his materials.

Allied, the accused infringer, has advanced an appealing argument that the patent is actually obvious. It contends that since the main problem exhibited by the known-art devices was their bulkiness and weight, the solution Sterner came up with—namely, making the base smaller—is obvious. Also, they point out that putting the electrical components in the pole rather than in the base does not solve a very sophisticated technical problem, especially since the electrical components are in the same place they would be in the Calso prior-art base if that base were shaped as the Sterner base is. There is a good deal of force to this argument, and if recognizing these characteristics were all there was to construing the patent, it would not be valid.

In applying the substantive standards of patentability to the invention in this case, however, we must follow established principles of patent construction. A presumption of validity attaches to patents that have survived the scrutiny of the Patent Office, and therefore the courts must construe those claims narrowly so as to avoid anticipation and obviousness if that is at all possible. 35 U.S.C. §282 (1954); Helms Prod. v. Lake Shore Mfg. Co., 7th Cir. 1955, 227 F.2d 677, 680; Williams Mfg. Co. v. United Shoe Mach. Corp., 6th Cir. 1941, 121 F.2d 273, aff'd 316 U.S. 364, 62 S.Ct. 1179, 86 L.Ed. 1537. And it is to be emphasized that it is the claims of the patent, and not any particular device manufactured by the patentee, to which we must

look. Beckman Instruments, Inc. v. Chemtronics, supra; Hensley Equip. Co. v. Exco Corp., 5th Cir. 1967, 383 F.2d 252. Those claims must adequately and specifically describe a patentable invention. Thus it happens as a practical matter that patents claiming narrow, specific inventions are more likely to withstand attack on anticipation or obviousness grounds than patents that make broad, general claims, however humble or exalted the actual product of the inventor's mind may have been.

As a consequence of these principles, we are able to hold that the patent in suit, which is not broad and general but is a highly specific solution to a particular set of problems, is not invalid for obviousness. It may be true that the relevant art is not highly sophisticated. The invention itself is not very sweeping or impressive. It may likewise be true that the main problem involved, which is that prior bases were too big, is not difficult to apprehend. And we may agree that if Sterner had simply written a patent that claimed any and all bases that solved this problem by making the base smaller, that patent would be invalid for obviousness. The relevant fact, however, is that the patentee has specified the solution in detail rather than merely stating that the base should be made smaller. In doing so, he was required along the way to solve some technical problems whose solution would probably not be obvious to a person of ordinary skill in the art. For example, the base plate is a flat plane and the pole intersects it perpendicularly at the point of joinder. The Calso base has no such plate; the sides of its pyramidal pedestal join the pole at an angle. The flat planar base apparently makes for a lower profile, less weight, less bulk, and greater strength. We cannot say that this is an obvious way to make a

successful base. Also, rather than being connected to the ground on all four sides, the patent has supporting knobs on the side opposite the hinged edge, and a skirt hangs down over the opening between the flat plate and the foundation. This design preserves strength and simplicity without bulk, and we are told by the patentee, with the approval of the Patent Office behind him, that it also allows easy access to the electrical components and provides space for ventilation. All components of the base are coordinated with all other elements to produce these synergistic results. The essential characteristic of the patent is that all elements are specifically described, and coverage can be narrowly confined to the device the patentee actually invented. The patent therefore describes a unique, nonobvious solution to a problem rather than a general idea, which might well be nonpatentable on obviousness grounds.

Of course, a necessary concomitant of the construction we have followed in order to hold the patent valid is that the claims do not cover any invention other than the narrow one they specifically describe. The patent cannot cover all small lamp-post bases, or all lamp-post bases that locate the electrical components in the pole, or all lamp-post bases that avoid the disadvantages of the Calso base. It covers only those bases that solve the relevant problems in the way it describes, containing all elements it describes, arranged in the way it describes. Thus the construction we have been required to place upon the patent intimately affects the issue of infringement. Since we have thus disposed of the issue of validity, we now pass on to consider whether the patent is infringed.

II. Infringement

Whether a patent is infringed is primarily a question of fact. National Athletic Supply Co. v. Tone-O-Matic Prod., Inc., 5th Cir. 1970, — F.2d — [No. 27531, slip opinion dated January 9, 1970]; Noe v. Smith, 5th Cir. 1962, 300 F.2d 430; U.S. Industries, Inc. v. Otis Engineering Corp., 5th Cir. 1958, 254 F.2d 198. Appellate courts are extremely reluctant to overturn jury findings on the issue of infringement, and will do so only if those findings contain a clear error of law or fact. But there are rare cases in which an appellate court may consider infringement directly. One such case is that in which the construction of the patent, itself a question of law, is the main detriment. In a situation "requiring appropriate application of standards of law to facts largely undisputed, . . . [there is] no necessity for remand" even where a court reverses an issue usually regarded as one of fact. National Filters, Inc. v. Research Prod. Corp., 5th Cir. 1967, 384 F.2d 516, 518; see also Reynolds-Southwestern Corp. v. Dresser Industries, Inc., 5th Cir. 1967, 372 F.2d 592, 595. In this case, we find that the construction we have been required to place upon the patent enables us to decide the issue of infringement as one of law.

As we have stated, there can be no question that the allegedly infringing device was developed in response to the success of the Sterner patented base. This may be some evidence of the validity of the patent, but it is not particularly strong evidence even as to that, and it has no relevance to the question of infringement. Indeed, evidence that an alleged infringer produced his device in response to the success of a patented invention may well be misleading, since

every person has the right to compete with the producer of a patented device if only he obtains his results by means different from those of the patented object. This kind of competition, in fact, is especially to be encouraged, since a patent confers a limited monopoly and allows its holder to exact what is in effect a tax upon the public. Accordingly, the more reliable guide is inspection of the patent and the accused device themselves.

A device infringes a patent if it exhibits substantial identity with the patented device as to means, operation and result. McCutchen v. Singer Co., 5th Cir. 1967, 386 F.2d 82; Foster Cathead Co. v. Hasha, 5th Cir. 1967, 382 F.2d 761. A combination patent is not infringed unless the accused device is substantially identical to the patent in all the elements that are essential to the combination. Reed v. Parrack, 5th Cir. 1960, 276 F.2d 784, 788. It is quite clear that this identity is not present here, given the narrow construction we must apply to the patent. Results obtained by the two devices may be similar since both are hinged lamp bases with low profile, light weight, and easy access to the interior; and operation is similar also. But the bases are structurally different enough that the coordination of elements in the synergistic design clearly presented different problems that had to be solved by its designers. Thus different means are employed by the two bases.

We may point out some of the differences by describing them briefly. Instead of the skirt hanging down from the flat upper plate to cover the sides of the base, the accused device has merely a flat plate, and the sides are covered by a bowl-like lower section that comes up from the foundation. The bowl-like sides of the lower section serve the function of the knobs that protrude from the foundation of the

Sterner device and keep the flat upper plate horizontal. As a result, the weight of the base is different, as are its ventilation characteristics. The accused device employs a different means of joining the base to the pole, with an angular collar above the flat plate surrounding the pole, and it is to this collar that the hinge is attached. Making this structure exhibit the characteristics that the Sterner device exhibited—strength, light weight, ventilation, room for all electrical components, attractiveness—posed different structural problems from those posed by the patented Sterner device itself. It may be that they are not highly difficult or sophisticated problems, but if that is so neither were the problems behind the Sterner base once one apprehended the general idea that the base could be made smaller. The differences, furthermore, are significant. They are of the same character as those used by Sterner to distinguish the prior art. A patent may not, like a "nose of wax," be twisted one way to avoid anticipation and another to find infringement. White v. Dunbar, 1886, 119 U.S. 47, 51, 7 S.Ct. 72, 74, 30 L.Ed. 302; Permo v. Hudson-Ross, 7th Cir. 1950, 179 F.2d 386. As a consequence of the required narrowness of the claims, we find as a matter of law that the accused device is not substantially identical to the patent.

This construction of the patent so as to confine it narrowly to the precise device it describes doubtless renders it of substantially less value than a broader patent could have. Usually a patent will not be so strictly construed that it is held to the strict device described by the claims or shown through the drawing. See Edward Valves, Inc. v. Cameron Iron Works, Inc., 5th Cir. 1961, 286 F.2d 933; Abbott v. Barrentine Mfg. Co., N.D. Miss. 1966, 255 F.

Supp. 890. In this case, however, it is the narrowness of the invention that requires the narrow construction. The patent is a limited one in a crowded art. The patentee cannot expect a roving commission to run off all effective competition and tax the public for all uses of a broad idea merely because he has devised a limited invention employing that idea.

Reversed.

14 STERNER LIGHTING v. ALLIED ELEC.

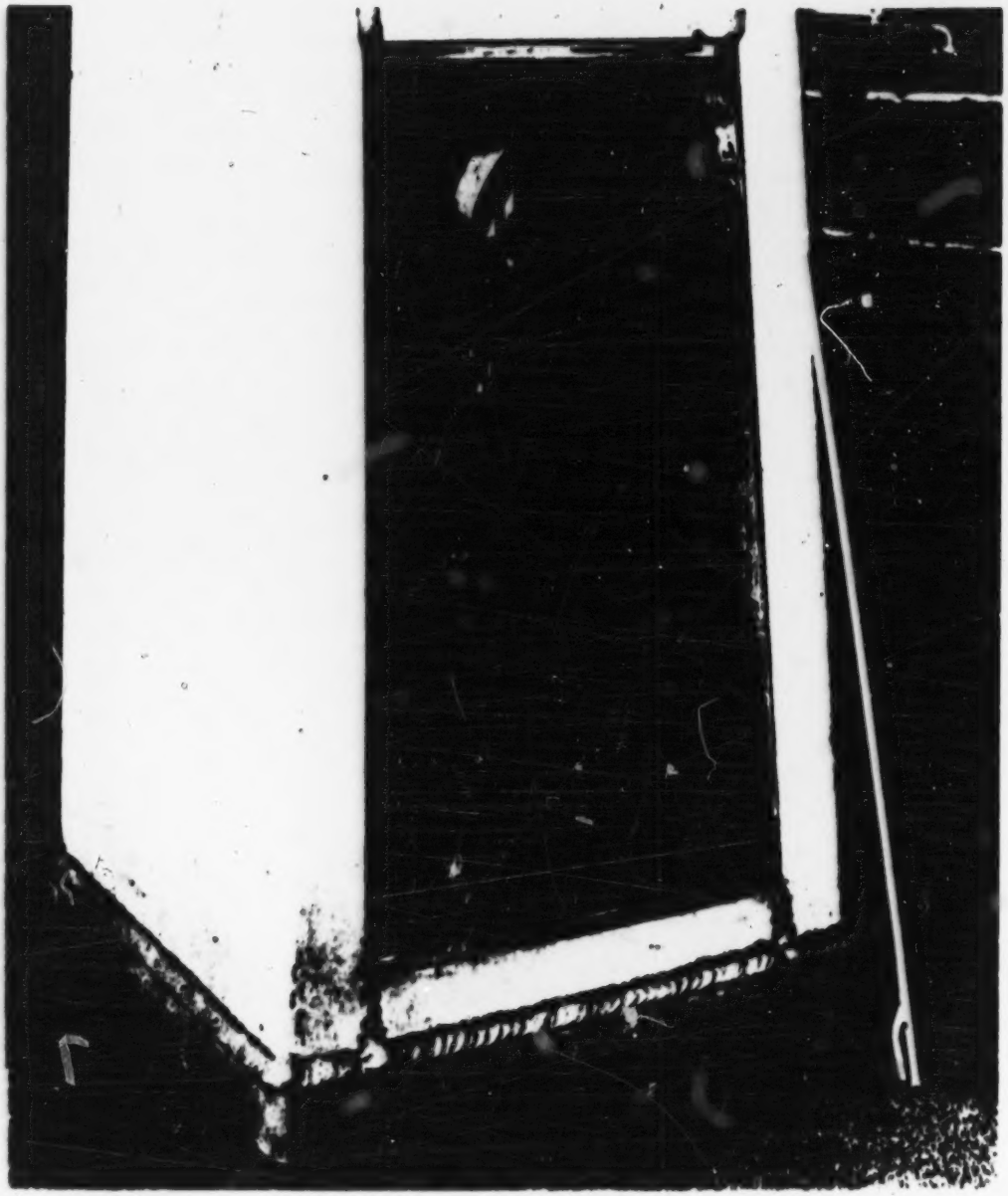

Figure 1
Prior Art: The "Calso Base"

July 21, 1964 K. F. GUGGEMOS 3,141,620

LIGHTING DEVICE

Filed May 5, 1960 4 Sheets-Sheet 2

FIG. 2

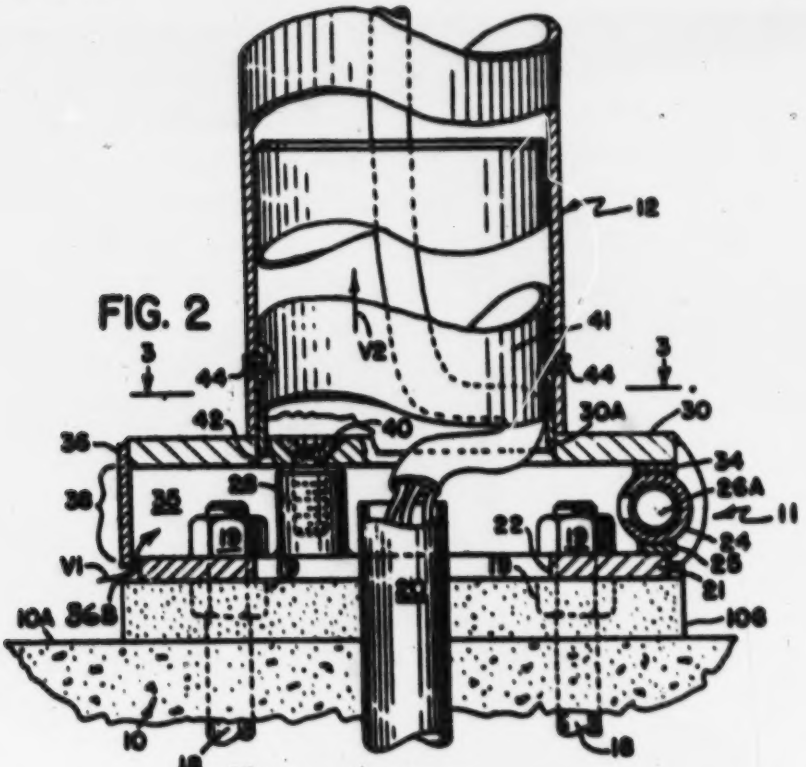

FIG. 3

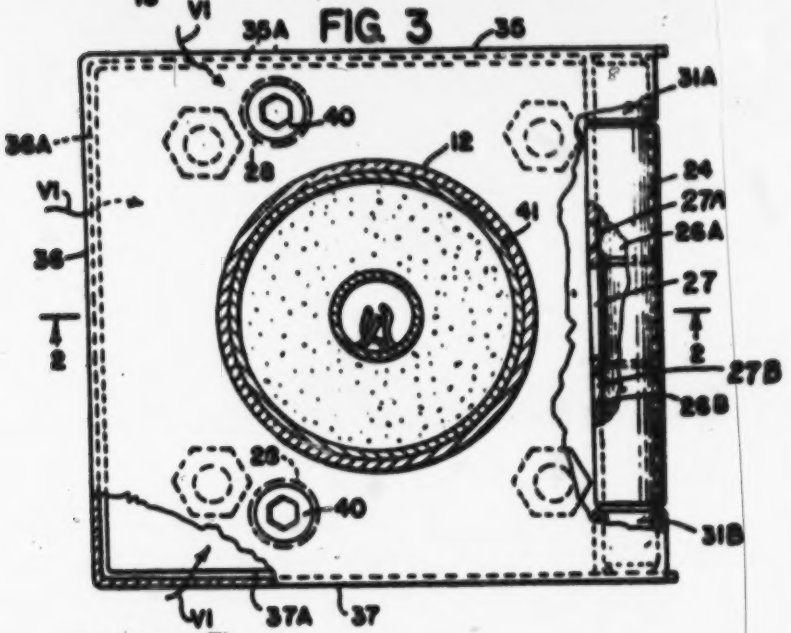

Figure 2
The Patented Sterner Base

Figure 3
The Allegedly Infringing Base
Manufactured by Allied

Brown, Chief Judge, concurring in part and dissenting in part:

I concur fully in the opinion and decision that there is no infringement. I respectfully dissent as to validity. I see no invention on any standard. The problem was a light pole which could be "collapsed" for maintenance. This called for a hinged base and the electrical circuitry to be readily available when the pole was lowered from the vertical. All Sterner did was take advantage of technological advances in the lighter materials for base and pole and, more important, in electronic circuitry which enabled all to be enclosed within the radius of the pole itself at the bottom end. Not much, if any, is now left but what there is, is too much.

(September 21, 1970)

On Petition for Rehearing

Before Brown, Chief Judge, Gewin and Thornberry, Circuit Judges.

Per Curiam:

It Is Ordered that the petition for rehearing filed in the above-entitled and numbered cause be and the same is hereby denied.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 20 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970.

No. 926

STERNER LIGHTING, INC., et al.,
Petitioners,

v.

ALLIED ELECTRICAL SUPPLY, INC., et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1970.

No.

STERNER LIGHTING, INC., ET AL.,
Petitioners,

v.

ALLIED ELECTRICAL SUPPLY, INC., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF CERTIORARI.

THE COURT OF APPEALS DECISION.

The Court of Appeals ruled that the Guggenheim patent claims in suit are not entitled to such scope as to cover respondents' accused device and therefore are not infringed. The Opinion of the Court of Appeals is reported at 166 USPQ 454, — F. 2d —, and in Petitioners' Appendix, A-9-25.

There are no special, important, legal, or public policy interests or reasons why Petitioners' Writ should be granted.

JURISDICTION.

Jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED.

Petitioners' "Question" (1) and (2) are based on purported expert opinion testimony of one C. O. Grannis, contrary to the undisputed facts of the case; furthermore, as set forth below, Grannis was not qualified to testify as an infringement expert. Respondents consistently denied infringement.

Petitioners' "Question" (3) assertion that the Court of Appeals should have decided the issue of infringement on literal wording of claim 11, in *vacuo*, is contrary to the decisions.

The Court of Appeals correctly ruled herein that there is no infringement, under the undisputed facts of this case, on principles well settled, and Petitioners have raised no proper issue for review by this Court.

STATEMENT.

The Guggemos patent in suit is directed to a hinged lamp-post base. Petitioners did not prove anything *sui generis* the hinging of lamp post bases, nor did Petitioners establish any new function for the structure of Guggemos patent claim 11—even if literally interpreted, over the *Calso* prior art device (physical exhibit D-45 and photo Ex. D-9a, 636a and p. 2b *infra*) wherein the pole and ballast move, in hinging the lamp post up and down, as one unit—just as in the Guggemos patent. Respondents' accused device (Ex. P-41, 619a and p. 1b *infra*) has an ordinary hinge arrangement, not disclosed in the Guggemos patent. Guggemos claim 11 is directed to a hinged base pole, with the ballast in the lower end of the pole.

ARGUMENT.

Petitioners assert that the Court of Appeals was required to apply and interpret claim 11 as that claim literally appears—word for word—an interpretation in *vacuo*, without regard to the specification of the patent which sets forth the details of petitioners' alleged invention, and without regard to the prior art (for example, the Calso device).

The Court of Appeals in the present case found respondents' argument that the Guggemos patent is invalid for obviousness "an appealing argument" (Petitioners' Appendix A-15, 166 USPQ 454, 457) but saved the claims from a ruling of invalidity (Petitioners' Appendix A-19, 166 USPQ 454, 459) stating that they cover the hinge features described in the Guggemos patent, differentiating from *Calso*, and thus, also, from defendants' accused device: "It is quite clear that this identity is not present here, given the narrow construction we must apply to the patent."

Respondents submit that the Court of Appeals was correct in interpreting and applying claim 11, not in *vacuo*, as petitioners would like, but to cover the novelty involved —the actual differences between the disclosure in the Guggemos patent specification and the prior art. As stated in *Clark v. Wright Aeronautical Corporation*, 162 F. 2d 960, 962 (2d Cir., 1947):

> "it is horn-book law that no claims are to be read in abstractu."

Thus, the Court of Appeals measured the scope of the claims as limited to the contribution made by the patentee to the advance of science and the useful arts. The precise test thus applied by the Court of Appeals (as to which petitioners complain) was applied in the recent case of *Decca, Ltd. v. United States* (quoted directly below) recently before this Court on a petition for certiorari denied by this

Court October 19, 1970; as stated in *Decca Ltd. v. United States*, 420 F. 2d 1010, 1013 (U. S. Ct. Cl., 1970, c.d. Oct. 19, 1970; 167 USPQ advance sheets, No. 5, p. II):

> "In determining the issue of patent infringement, it is well settled law that in the first instance resort must be made to the language of the patent claim. Graver Tank & Manufacturing C. v. Linde Air Products Co., 339 U. S. 605, 70 St. Ct. 854, 94 L. Ed. 1097 (1950). The literal words of the patent claim constitute, however, only the starting point in the determination of this issue. The state of the prior art and the prosecution history of the patent application in the Patent Office are also important factors which must be considered in determining the meaning of a patent claim. Graham v. John Deere Co., 383 U. S. 1, 17, 86 S. Ct. 684, 15 L. Ed. 2d 545 (1966)."

Further in point are:

> "It is well settled that a patent owner may not apply a narrow construction to his claim to avoid the prior art and then apply a broad construction to include an accused device. If the claims in suit are interpreted so as to avoid the prior art, then they cannot cover pivoted links which were old in the art, but must be restricted to the base plate, guide rods, followers and support member arrangement disclosed in the patent. Any interpretation of the claims in suit which would render them broad enough to cover accused Model 110, would render them invalid on the prior art."
>
> "'What constitutes equivalency must be determined against the context of the patent, the prior art, and the particular circumstances of the case.' Graver Tank & Mfg. Co., Inc., et al. v. Linde Air Products Co., 339 U. S. 605, 609, 70 S. Ct. 854, 856, 94 L. Ed. 1097. Where the

patent is found in a crowded art, the doctrine of equivalents is given a narrow range. Parmelee Pharmaceutical Company, et al. v. Zink, 8 Cir., 285 F. 2d 465. Fife was working in a crowded art. The District Court held the doctrine of equivalents did not apply, and we agree." *Fife Mfg. Co. v. Stanford Engineering Co.*, 299 F. 2d 223, 226 (7th Cir., 1962).

In *Plax Corp. v. Precision Extruders, Inc.*, 239 F. 2d 792, 795 (3rd Cir., 1957), the Court quoted with approval the rule:

> "'that a patentee's broadest claim can be no broader than his actual invention, no matter how it may be expressed or what other claims his patent may contain' (citing cases). This is a correct statement of the law."
>
> * * *
>
> "While it is a rule that the scope of the grant is measured by the claim, yet it is true, so we think, that such grant cannot be broader than the invention described in the specifications." * * * "Therefore the claims, if their validity is to be sustained, must be confined to the invention described in the specifications. When so construed, they are not infringed by defendant's process." *Texas Co. v. Globe Oil & Refining Co.*, 225 F. 2d 725, 735 (2d Cir., 1955).
>
> * * *
>
> "At any rate, the fact that the claims of the Marx patent are broad enough to cover appellant's process does not establish infringement. The claims are to be read in connection with the specifications, and a patentee's broadest claim can be no broader than his actual invention." *Kemart Corp. v. Printing Arts Research Laboratories*, 201 F. 2d 624, 629 (9th Cir., 1953).

Petitioner, Guggemos, under direct examination, (519a-520a) when asked to compare the literal wording of his claim 11 and the prior art *Calso* device (p. 2b *infra*) said:

"A. Well, in claim 11 of my patent I use a ballast in the pole shaft itself as opposed to having it in a pedestal base or transformer base as you see here". Thus claim 11 in suit: "rests upon exceedingly small and quite non-technical mechanical differences in a device which was old in the art." *Graham v. John Deere Co.*, 383 U. S. 1, 36 (1966).

The use of a ballast or transformer in a pole was admittedly old in the art, and the use of a hinged pole was admittedly old in the art, in the *Calso* and other prior art devices; Petitioners' attorney stated (transcript 625):

> "We admit that the idea of a hinged base like this, somebody else had the idea before, the Kubesh patent had it, and we so admit, and we admit somebody else thought up a light pole before, and that somebody had what is called a luminaire up at the top. We admit that they had this ballast before, although it was not up in the pole, it was down in the base."

The alleged improvement in claim 11, even if literally interpreted, is a mere reversal (as in *Graham v. Deere*, *infra*) of position of the "ballast" (transformer) for the pole; such asserted "gain" or point of distinction over *Calso* is like that discussed by this Court (in comparing a *Glencoe* prior device with the Graham patent device):

> "Furthermore, even though the position of the shank and hinge plate appears reversed in Glencoe, the mechanical operation is identical * * * and 'presents no operative mechanical distinctions, much less nonobvious differences." *Graham v. John Deere Co.*, 383 U. S. 1, 26 (1966).

The Issue of Infringement.

Petitioners allege in "Question" (1) an admission of infringement, but the fact is that respondents, through their witness Baldwin and otherwise throughout this case, denied that Guggemos patent claim 11 is properly readable on respondents' accused device, since, if so read, it reads on the prior art Calso device. The Court of Appeals took the same view and position, holding that, in order to avoid a holding of invalidity of the Guggemos patent claims—(if literally interpreted) the Court would interpret the claims to the points of difference between the Guggemos patent specification disclosure over the prior art. Thus the Court of Appeals interpreted the claims as covering the alleged invention made by Guggemos and, so interpreted, as not infringed by respondents' accused device.

Respondents' denial of infringement is stated three times in the pre-trial stipulation (24a):

(1) "It is stipulated between the parties that:" * * * "Defendants have counterclaimed for a decree declaring that the Plaintiffs' patent is invalid and has not been infringed by the Defendants". (24a)

(2) "ISSUES OF LAW" * * * (B-2) "whether the claims in suit are properly readable on and cover the defendants' devices in suit;". (47a)

(3) "And the matters of law for determination of this Court, viz., " * * * "2. Whether the claims in suit are properly readable on and cover the defendants' devices in suit." (49a)

Respondents' expert, Baldwin, pointed out (441a) there is no wording in claim 11 which could possibly distinguish it from the Calso device.

Respondents, throughout the trial and appeal, argued that the Guggemos claims are not infringed in view of the anticipating Calso device, and in their brief on appeal to the Court of Appeals said: "Claims 11, 12 and 14 of the Guggemos patent in suit, are, as a matter of law, invalid for obviousness and not infringed in view of the Calso prior use" etc. and "The judgment for plaintiffs should be reversed and the case remanded for entry of judgment that claims 11, 12 and 14 of the Guggemos patent in suit are invalid and not infringed."

Petitioners' professed expert on infringement, C. O. Grannis (appearing in P-41, p. 1b *infra*) admitted, under examination by respondents' attorney (85a) that (a) he had not examined the file wrapper of the Guggemos patent in suit (b) had not examined the file wrapper references, and (c) had not previously testified in any patent litigation; his testimony as an infringement expert was objected to (89a and 91a and 241a).

Petitioners cite the trial Judge's charge to the jury on claim 11 as an "admission" of infringement; that charge was given by the trial Judge after rejecting (673a-674a) respondents' requests to charge, Nos. 1, 1a, 1b, 1c and 2 (674a-676a), requiring the jury to make specific findings as to the Calso device in relation to the claims in suit.

The trial Court, in the present case, instructed the jury (552a-553a) that the respondents (defendants) deny infringement:

> "The defendants say no. Number one, even if everything you said was true we have not infringed your patent because we do not have every part or element recited in your claim in our accused device.
>
> "They say not only that, but you did not invent anything."

The Court herein charged the jury (567a):

> "In interpreting Claims 11, 12, 14, in reference to the language of the claims, in the limitation, in the interpretation or construction in reference to the prior patents, publications or uses, that any such interpretation should also be applied for the purpose of deciding the question of infringement."

The Court of Appeals in the present case noted (Petitioners' Appendix A-18, 166 USPQ 454, 458) that:

> "In a situation 'requiring appropriate application of standards of law to facts largely undisputed, * * * [there is] no necessity for remand' even where a court reverses an issue usually regarded as one of fact."

That is the rule stated by this Court in *A & P Tea Co. v. Supermarket Corp.*, 340 U. S. 147, 153 (1950): "The questions of general importance considered here are not contingent upon resolving conflicting testimony for the facts are little in dispute." To the same effect:

> "Furthermore upon the undisputed evidence the question of infringement resolves itself in each case into one of law, depending upon a comparison between the structure disclosed on the face of the patent and the device shown in the Dent latch, and the correct application thereto of the rule of equivalency." *Sanitary Refrigerator Co. v. Winters*, 280 U. S. 30, 36 (1929).

The Court of Appeals pointed out differences between respondents' accused device and the Guggemos' claims in suit "given the narrow construction we must apply to the patent" (Petitioners' Appendix A-20 and 166 USPQ 454, 459) and that:

> "As a consequence of the required narrowness of the claims, we find as a matter of law that the accused device is not substantially identical to the patent."

That is the rule stated by this Court:

> "To us, the limited claims of the Scoggin patent are clearly evident from the prior art as it stood at the time of the invention." *Graham v. John Deere Co.*, 383 U. S. 1, 36.

CONCLUSION.

It is respectfully submitted that the "issues" in the petition are old points, fully briefed and argued, considered, and adjudicated by the Court of Appeals in accordance with this Court's rulings, and that the petition should be denied.

Respectfully submitted,

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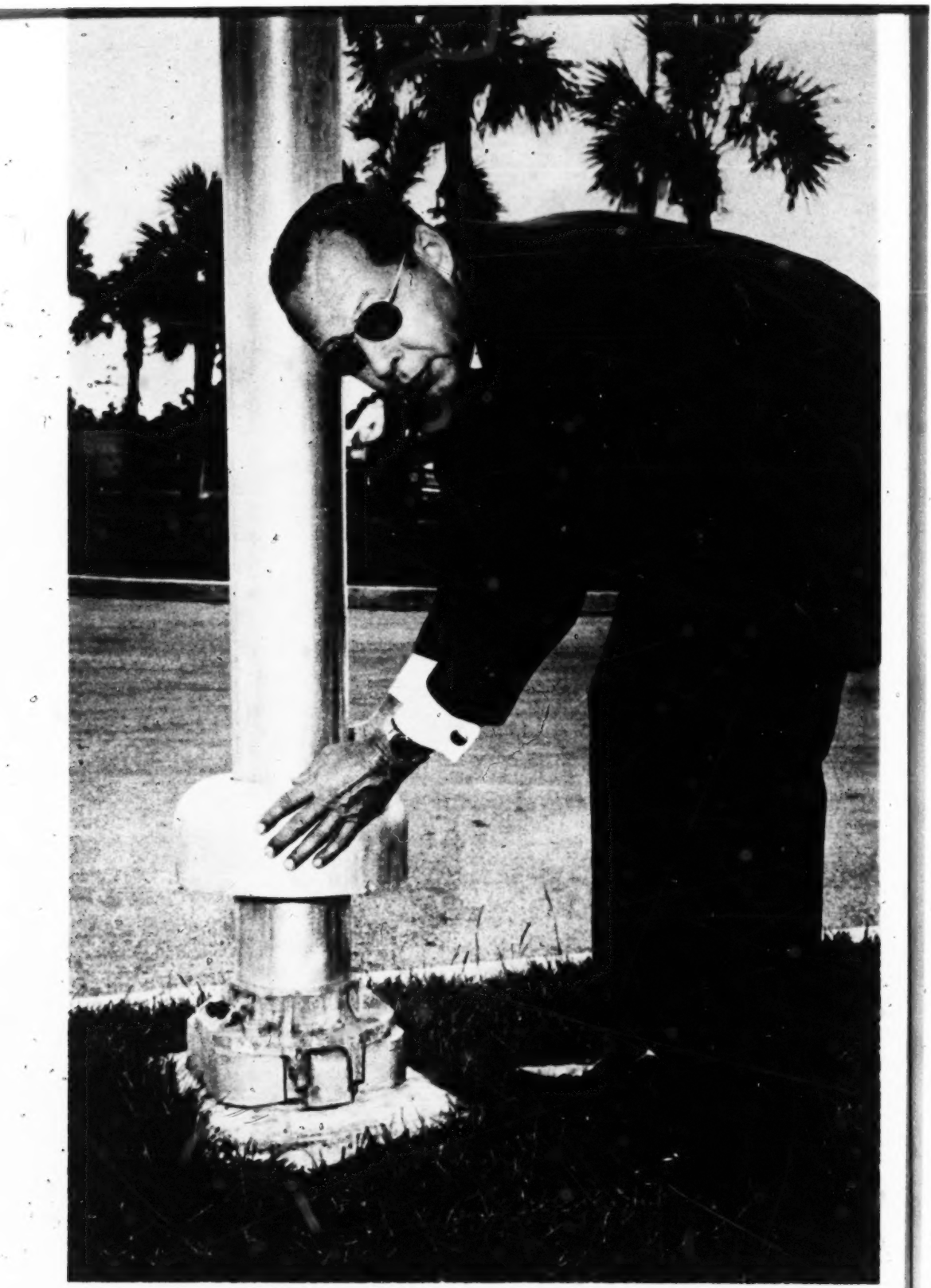

Photo of Respondents accused device shown in elevated or closed position. (Ex. P-41)

Photo of prior art Calso device. (Ex. D-9a)